Filed 4/8/10 In re Quarterman CA1/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re MICHAEL QUARTERMAN, on Habeas Corpus.	**A124316** **(Solano County Super. Ct. Nos. 15319, 115319)**

After the Board of Parole Hearings (Board) decided to release petitioner Michael Quarterman on parole, Governor Arnold Schwarzenegger reversed the Board's decision. Petitioner seeks habeas relief, arguing that the Governor's decision does not withstand scrutiny since the record lacks evidence supporting the conclusion that petitioner currently presents an unreasonable risk of danger to society if released. We agree, and will order that the Board's decision be reinstated.

I. BACKGROUND

A. *Evidence Presented at the October 18, 2006 Parole Suitability Hearing*

Petitioner was convicted in 1982 upon his guilty plea to second degree murder, and sentenced to a term of 15 years to life in prison. At the time of the crime, petitioner was 23 years old, making him approximately 51 years old now. Petitioner's minimum eligible parole date passed on September 6, 1989. The October 18, 2006 hearing before the Board was petitioner's eleventh subsequent parole suitability hearing.

The Life Prisoner Evaluation Report (Report) prepared for the Board hearing summarizes the facts of petitioner's crime as follows: "On the evening of July 11, 1981,

Michael Quarterman (prisoner), Lawrence Stewart (victim), and another individual met and conversed at a bar in Vallejo, California. The prisoner and the victim exchanged heated words. Allegedly, due to the attention the victim paid to the prisoner's girlfriend. When the victim left the bar in his vehicle, the prisoner, and another individual in the prisoner's car followed him. Both vehicles stopped at 420 Benicia Road with all three individuals exiting their vehicles. They were talking when the prisoner began punching the victim in the face. The prisoner went to his vehicle and retrieved a sword. He returned and began slashing the victim's face and neck area. The prisoner stabbed the victim in the stomach. Police Officers, responding to a call concerning noise and fighting, arrested the prisoner as he was returning to his car. The victim was pronounced dead later that evening at 3:59 a.m." The Report recounts that petitioner "states that he accepts full responsibility for his behavior and expressed remorse for the victim and his family."

At the parole hearing, petitioner did not deny responsibility for the crime, but disagreed with some of the facts contained in the Report. Petitioner's version of the crime was as follows: The argument with the victim was precipitated by petitioner having broken up two fights initiated by the victim outside of the bar. Petitioner followed the victim to "talk things out." Petitioner's companion hit the victim first with a broken pool stick. Petitioner acted in self-defense since he believed the victim possessed a gun.

At the time of the commitment offense, petitioner had graduated from high school, was attending junior college, and had been laid off from his job as a water maker trainee. Following his layoff, petitioner was depressed and drank substantially more alcohol. According to petitioner, alcohol played a significant role in the commitment offense.

Petitioner's criminal history includes assault, battery and robbery convictions in 1974 (when petitioner was 15), which resulted in a California Youth Authority commitment until December 23, 1975. In 1978, when petitioner was an adult, he was convicted of resisting a public officer and disturbing the peace.

At the time of his October 18, 2006 hearing before the Board, petitioner's classification score was 19.[1] During his incarceration, petitioner received a total of three serious disciplinary findings,[2] the most recent from December 1992, for a physical altercation. Before that, in 1986 petitioner was disciplined for refusing a direct order, and in 1985 petitioner was disciplined for possessing marijuana. Petitioner also received two "counseling chronos,"[3] one in 1995 for smoking and the second in 1986 for not reporting for work. Petitioner's file contained laudatory chronos from 2004 through 2006, indicating petitioner's completion of numerous educational, employment and rehabilitation programs. At the time of his 2006 hearing, petitioner was working as an optician.

The Board considered a psychological evaluation authored by John T. Rouse, Ph.D., dated December 13, 2004, which states: "Mr. Quarterman's commitment offense is not related to any specific mental disorder. The commitment offense is related specifically to his life style and his affiliations and, perhaps a past history of alcohol abuse. He has a current classification score of 19, which is due to his lifer status. He has been discipline free for a minimum of 10 years. Of the disciplinary actions that he has acquired in the past, none were for violence against staff. He has been involved in a number of prosocial activities including a stress management program, NA and AA, an anger management program, an alternative to violence, Men's Violence Prevention, Breaking Barriers, VORG, and VOLT. He has upgraded vocationally by acquiring two vocational certificates. Mr. Quarterman has matured and seems to have developed

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[1] This appears to be the lowest [i.e. best] classification score for an inmate sentenced to a life term. (Cal. Code Regs., tit. 15, § 3375.4, subd. (*i*), and accompanying graphic [CDC Reclassification Score Sheet]; see also tit. 15, § 3375, subd. (d): ["The classification of felon inmates shall include the classification score system as established. A lower placement score indicates lesser security control needs and a higher placement score indicates greater security control needs."].)

[2] A CDC Form 115 is used when misconduct violates the law or is not minor in nature. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).)

[3] A CDC Form 128-A is used to document minor misconduct in prison. (Cal. Code Regs., tit. 15, § 3312, subd. (a)(2).)

character as a man and as a person. He acknowledged culpability and responsibility for his commitment offense and, in the opinion of this examiner, he expressed genuine regret, remorse, and compassion for the victim and his family. Thus, there is a high medical probability that his current risk of dangerousness is lower than that of the average inmate incarcerated here at CSP-Solano and probably average for most citizens in the community. . . . Mr. Quarterman has been assessed by a number of clinicians prior to the assessment by this examiner. These other assessors have been consistent in their opinions that Mr. Quarterman poses no more than a normal risk of dangerousness in or out of a controlled setting. He does not have a diagnosable mental disorder. Thus, in the opinion of this examiner, Mr. Quarterman would likely be an appropriate candidate for parole. Psychiatric issues should not be a factor in any considerations that the Board would make when considering Mr. Quarterman for parole."

The Board reviewed petitioner's parole plans, which included petitioner's intention to reside with his mother in Vallejo, and to be employed at Gary's Furniture Store in Vallejo. The owner of Gary's Furniture Store—petitioner's pastor—wrote in a letter to the Board that he has known petitioner for approximately 45 years and would "have a job waiting for him upon his return."

At the Board hearing, the presiding commissioner observed that petitioner seemed calm. Petitioner agreed that at the time he was committed, he was ready to "fight at a drop of a hat," but now he had "counseled and matured," "turned [his] life over to Christ," and had become a spiritual person. Petitioner explained that self-help programs had taught him ways to recognize and control his anger. In response to concerns expressed about petitioner's mother's problems with alcohol, petitioner stated that he would be involved in Narcotics Anonymous and Alcoholics Anonymous if released.

The district attorney urged that the Board give petitioner a one-year denial and instruct petitioner to work on establishing substantial support connections in the community (such as with Alcoholics Anonymous). The district attorney remarked that petitioner "has made substantial progress for the parole date and I am persuaded that he has substantial maturity and probably has gained substantial insight."

B. *The Board's Grant of Parole*

The Board concluded that petitioner was suitable for parole and would not pose an unreasonable threat to public safety if released from prison. The presiding commissioner explained the Board's reasoning as follows: "While in prison, the Inmate has enhanced his ability to function within the wall[s] on release through participation, self-help and therapy programs, AA, anger management and many others, vocational programs, heating and air conditioning vocation, vocational eyewear manufacturing, institutional job assignments, excellent work evaluations. He committed the crime as a result of significant stress in his life, the loss of employment, abuse of alcohol [and] because of maturation, growth and later understanding and advanced age, [there is a] reduced probability of recidivism. Inmate has realistic parole plans, including a job offer, family support, presented the Panel with temporary employment and a five-year plan, has maintained close family ties while in prison, maintained positive institutional behavior for nearly 15 years, showed signs of remorse, indicated that []he understands the nature and magnitude of the offense and accepts responsibility for the criminal behavior. Psychiatric evaluations dated December the 13th of '04 by Doctor Rouse is favorable in that the doctor indicates that the inmate poses a low risk of danger if released. In addition, Doctor Veerman on November the 19th 1999, indicated that the inmate poses a low risk of danger in or out of prison."

The Board set petitioner's term of confinement at 168 months, and set conditions on petitioner's release, including not using alcoholic beverages, submitting to alcohol, narcotic, and THC testing, and participating in substance abuse programs such as AA and/or NA.

C. *The Governor's Reversal of the Parole Decision*

On March 16, 2007, Governor Schwarzenegger reversed the Board's grant of parole in a written decision. The Governor first recognized various positive factors concerning petitioner's parole suitability. The Governor noted that petitioner is a high school graduate with some college education, and he has "made efforts to enhance his ability to function within the law upon release" by completing vocational training (in

eyewear manufacturing, refrigeration and air conditioning) and holding jobs (teacher's aide, plant operations maintenance repairman, yard worker, day laborer, and other positions). The Governor observed that petitioner "availed himself of self-help and therapy, including Alcoholics Anonymous, Narcotics Anonymous, Men's Advisory Council, Offender Employment Continuum, Anger Management, Stress Management, Alternatives to Violence, Victim Offender Reconciliation Group, Category X, Long Term Commitment Group, Project Last Chance, Breaking Barriers, and Framework for Recovery. Further, petitioner "maintains seemingly solid relationships and close ties with supportive family and friends, and he received favorable evaluations from various correctional and mental-health professionals over the years." Additionally, the Governor found that petitioner has "made plans upon his release to live with his mother in Solano County, the county of last legal residence, and to work at a furniture store in Solano County."

Nevertheless, the Governor found that the positive factors did not outweigh other factors indicating petitioner's lack of suitability for parole. He wrote: "Despite the positive factors I considered, the second-degree murder for which Mr. Quarterman was convicted was especially atrocious because his actions—beating Mr. Stuart, obtaining a sword, slashing and stabbing Mr. Stuart in the throat and face, stabbing Mr. Stuart in the abdomen, and then leaving him to bleed and die—demonstrated an exceptionally callous disregard for Mr. Stuart's suffering and life. According to the probation report, Mr. Quarterman beat Mr. Stuart, as evidenced by the pattern of blood stains on Mr. Quarterman's tennis shoes. Mr. Stuart's right eye was swollen shut with a large hematoma. Mr. Quarterman also slashed Mr. Stuart across the left side of his throat, revealing blood vessels and fat. In addition, Mr. Quarterman stabbed through the left corners of Mr. Stuart's mouth, both lips, and left nostril. He also stabbed Mr. Stuart in the epigastrium (the abdominal wall above his navel). The gravity of the second-degree murder committed by Mr. Quarterman is alone sufficient for me to conclude presently that his release from prison would pose an unreasonable public-safety risk. The Solano

County District Attorney's Office agrees, registering opposition to parole with the 2006 Board based, in part, on the gravity of the offense.

"When he committed this crime, Mr. Quarterman was 23 years old. According to the probation report, 'Mr. Quarterman's criminal history indicates a pattern of assaultive, aggressive behavior.' Indeed, he was adjudicated as a juvenile for assault, and he was made a ward of the court. He was also adjudicated for battery on a juvenile hall counselor and for robbery, and he was committed to the California Youth Authority (CYA). As an adult, he was convicted for using offensive language in public and for resisting arrest. In addition, Mr. Quarterman admitted to the probation officer that he used marijuana prior to the life offense.

"Mr. Quarterman's behavior in prison is equally unacceptable. During his incarceration for murder, Mr. Quarterman was disciplined for fighting with another inmate, refusing an order, and possession of marijuana. He was also counseled twice for minor misconduct, most recently in 1995. Mr. Quarterman's criminal record and his continued failure to live within the rules of his environment in prison—particularly given the violent and aggressive nature of some of his conduct—weigh heavily against his parole suitability at this time.

"Michael Quarterman claims, as he told the 2002 Life Prisoner evaluator, that he killed Lawrence Stuart in self defense. He told his 2004 mental-health evaluator that, while at the bar, he broke up two fights involving Lawrence, and that Lawrence became angry because Michael was 'in his business.' Michael said he later followed Lawrence home because he 'just wanted to talk with him.' Michael told the 2005 Board that they drove to Lawrence's house and then got out of the cars and talked. Michael said that at some point, David Burns struck Lawrence on the head with a pool cue. Lawrence fled, and David pursued him. Michael said he believed Lawrence was armed with a gun, and so he obtained the sword from his car. Michael told the 1991 Category X evaluator that he followed Lawrence and David 'to protect me and [David].' Michael said David knocked Lawrence down, and as Lawrence attempted to get up, Michael approached Lawrence and cut him approximately three times with the sword. Michael then kicked

Lawrence, 'trying to knock him out.' Michael claimed, according to the 2004 mental-health evaluation, that David took Lawrence's wallet after the stabbing.

"Michael Quarterman says he accepts responsibility for his actions and is remorseful, but there is evidence in the record suggesting that he may not accept responsibility for the crime. According to the 1981 polygraph examination report, the polygraph examiner concluded that David Burns was truthful when he denied causing 'any of the injuries to Lawrence Stewart [sic].' Additionally, the examiner concluded that Mr. Burns truthfully said he did not 'have physical possession of Stewart's [sic] wallet after he was injured.'

"The 1991 Category X evaluator said, 'Mr. Quarterman presents an account of the offense that in almost all regards minimizes his motives and actions, even though he accepts ultimate culpability for the offense.' The evaluator pointed out that Mr. Quarterman's explanations lack logic, saying, '[w]hy attempt to follow and befriend a man you have angered and believe is armed? Why attack the victim with a sword who is outnumbered and already being subdued by your crime partner? . . . Why not disarm the victim or stop him from getting his gun rather than hacking him to death? And what good is a sword with a three foot range against a gun with an essentially unlimited range, unless you know in actuality the man is not armed. The fact of the matter is that Mr. Quarterman's explanations are not persuasive or probably genuine.' The evaluator concluded, '[o]verall then it could be said that Mr. Quarterman has not yet come to terms with his offense or understood its underlying dynamics.'

"In finding Mr. Quarterman suitable for parole, the 2006 Board said the crime was committed 'as a result of significant stress in his life,' and noted his alcohol abuse and loss of employment. According to the probation report, Mr. Quarterman worked for a steel company for three months, and he was laid off approximately four months prior to the life offense. Before his job with the steel company, Mr. Quarterman worked part-time as a security guard. This job also lasted only three months. Mr. Quarterman told the probation officer that he 'had been laid off on numerous occasions.' The probation officer noted that, since being laid off from the steel company, Mr. Quarterman was

depressed and drank heavily. But even if Mr. Quarterman was under stress when he perpetrated the life offense, I believe that factor alone presently does not sufficiently mitigate the nature and circumstances of the murder he committed.

"At age 48 now, after being incarcerated for more than 25 years, Mr. Quarterman made some creditable gains in prison. But given the current record before me, and after carefully considering the very same factors the Board must consider, I find that the negative factors weighing against Mr. Quarterman's parole suitability presently outweigh the positive ones. Accordingly, because I believe his release would pose an unreasonable risk of danger to society at this time, I REVERSE the Board's 2006 decision to grant parole to Mr. Quarterman."

D. *Habeas Proceedings*

Petitioner sought habeas relief in the Solano County Superior Court, which denied his petition on December 10, 2007. On January 15, 2008, petitioner filed a habeas petition in this court, which we denied without prejudice to being refiled with an adequate record of the parole suitability proceedings. Petitioner renewed his petition in this court, with an adequate record, on March 17, 2009. After considering two rounds of briefing from the parties, we issued an order to show cause, ordered that counsel be appointed for petitioner, and requested and received a return and traverse.

II. DISCUSSION

1. *Timeliness of the Habeas Petition filed in this Court*

Pointing to the delay of over 13 months attendant to petitioner's resubmission of his habeas petition to this court following our denial of the prior petition, respondent contends that the petition should be denied as untimely. (See, e.g., *In re Clark* (1993) 5 Cal.4th 750, 782-787, 797-798; *In re Robbins* (1998) 18 Cal.4th 770, 780; *In re Gallego* (1998) 18 Cal.4th 825, 831; *In re Sanders* (1999) 21 Cal.4th 697, 703-705.) We disagree.

We find persuasive *In re Burdan* (2008) 169 Cal.App.4th 18, 30-31 (*Burdan*). *Burdan* holds that petitions challenging parole denials are not subject to the Supreme Court's precedents upon which respondent relies, as those cases involved collateral attacks on the underlying conviction. In that context, the Supreme Court explained that

its rationale for requiring prompt petitions is to vindicate societal interests in the finality of criminal judgments and the orderly and prompt implementation of laws, to help ensure that vital evidence will not be lost, and to further the value of the psychological repose that the crime victim or his or her survivors may experience upon finality of the ordeal. (*Id*., at pp. 30-31.) In contrast, *Burdan* found that "[t]hese same considerations do not apply where a life prisoner challenges a parole decision. The record before the Board or Governor is all on paper, so there is little risk of vital evidence being lost. Finality of the conviction, as to both society in general and the victims in particular, is not an issue. The only one potentially prejudiced by a delay in challenging a parole decision is the inmate himself. It is, after all, the inmate who must remain in prison after he or she might otherwise have been released on parole. Any delay in filing a petition challenging the denial of parole means a corresponding delay in the ultimate release date. [Citation.] Because this is not a situation where a grant of habeas relief would require a retrial of the criminal charges, there is no potential prejudice to the state." (*Id*., at p. 31.)

Even if a habeas petition concerning a parole denial is subject to the timeliness requirements of *In re Clark, supra*, 5 Cal.4th 750 and its progeny, we do not consider petitioner's delay to be so substantial as to bar his claims at the threshold. Additionally, like *Burdan*, "[w]e do not find a delay of [14] months for an unrepresented prison inmate to file a petition for writ of habeas corpus in the Court of Appeal, after denial of a similar petition in the superior court, to be unreasonable." (*Burdan, supra*, 169 Cal.App.4th at p. 31 [10-month delay between superior court denial of habeas relief and the filing of a habeas petition in the appellate court].)

2. *Standards Applicable to Parole Suitability Decisions and Judicial Review*

Penal Code section 3041, subdivision (b) provides that a parole release date "shall" be set unless it is "determine[d] that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual . . . ." The statute also directs the Board to "establish criteria for the setting of parole release dates . . . ." (Pen. Code, § 3041, subd. (a).)

The Board's criteria for setting parole release dates are set forth in the California Code of Regulations. (See Cal. Code Regs., tit. 15, §§ 2401 & 2402.[4]) The regulations require that "[a]ll relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." (§ 2402, subd. (b).)

"According to the applicable regulation, circumstances tending to establish unsuitability for parole are that the prisoner (1) committed the offense in an especially heinous, atrocious, or cruel manner; (2) possesses a previous record of violence; (3) has an unstable social history; (4) previously has sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (… § 2402, subd. (c).)" (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 653-654, fn. omitted (*Rosenkrantz*).)

The "circumstances tending to establish suitability for parole are that the prisoner: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress has built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of

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[4] Unless otherwise indicated, all further section references will be to title 15 of the California Code of Regulations.

recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (…§ 2402, subd. (d).)" (*Rosenkrantz, supra*, 29 Cal.4th at p. 654.)

"Finally, the regulation explains that the foregoing circumstances 'are set forth as general guidelines; the importance attached to any circumstance or combination of circumstances in a particular case is left to the judgment of the [decisionmaker].' (…§ 2402, subds. (c), (d).)" (*Rosenkrantz, supra*, 29 Cal.4th at p. 654.)

The Governor has the authority to review the Board's decision to grant parole to a prisoner convicted of murder. (Cal. Const., art. V, § 8, subd. (b); Pen. Code, § 3041.2.) When determining whether to reverse a grant of parole, the Governor must apply the same factors that guide the Board's decision. (*Rosenkrantz, supra,* 29 Cal.4th at p. 659.)

The judicial branch is authorized to review the Governor's decision to deny parole, but that review is strictly limited. A court may inquire only whether "some evidence" in the record supports the decision to deny parole, based upon the factors specified by statute and regulation. (*Rosenkrantz, supra,* 29 Cal.4th at pp. 658, 667.) "Only a modicum of evidence is required. Resolution of any conflicts in the evidence and the weight to be given the evidence are matters within the authority of the Governor . . . . [T]he precise manner in which the specified factors relevant to parole suitability are considered and balanced lies within the discretion of the Governor, but the decision must reflect an individualized consideration of the specified criteria and cannot be arbitrary or capricious. It is irrelevant that a court might determine that evidence in the record tending to establish suitability for parole far outweighs evidence demonstrating unsuitability for parole. As long as the Governor's decision reflects due consideration of the specified factors as applied to the individual prisoner in accordance with applicable legal standards, the court's review is limited to ascertaining whether there is some evidence in the record that supports the Governor's decision." (*Id.* at p. 677.)

Until relatively recently, the Courts of Appeal have struggled with the some evidence standard, disagreeing about how it should be applied. Our Supreme Court has

now resolved that conflict in *In re Lawrence* (2008) 44 Cal.4th 1181, and *In re Shaputis* (2008) 44 Cal.4th 1241. In *Lawrence*, our high court made clear the precise focus of the some evidence rule: "when a court reviews a decision of the Board or the Governor, the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Lawrence, supra,* 44 Cal.4th at p. 1212, original italics; see also *Shaputis, supra*, 44 Cal.4th at p. 1254.)

And, "although the Board . . . may rely upon the aggravated circumstances of the commitment offense as a basis for a decision denying parole, the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative of the statutory determination of a continuing threat to public safety." (*Lawrence, supra,* 44 Cal.4th at p. 1214, original italics.) The "statutory and regulatory mandate to normally grant parole to life prisoners who have committed murder means that, particularly after these prisoners have served their suggested base terms, the underlying circumstances of the commitment offense alone rarely will provide a valid basis for denying parole when there is strong evidence of rehabilitation and no other evidence of current dangerousness." (*Id.* at p. 1211.)

3. *The Governor's Decision Does Not Satisfy the Some Evidence Standard*

In reversing the Board's decision, the Governor relied in part on (1) petitioner's 1981 offense,[5] (2) petitioner's criminal history (convictions from 1974 and 1978), (3) petitioner's receipt of prison discipline between 1985 to 1992, and (4) minor misconduct committed by petitioner between 1986 and 1995. In the face of petitioner's extensive

[5] For purposes of this opinion, we will assume that some evidence supports the Governor's finding that petitioner committed the offense in an especially atrocious manner. (§ 2402, subd. (c)(1).)

subsequent rehabilitative efforts previously described, these circumstances—which occurred between approximately one to three *decades* prior to the Governor's 2007 decision—do not in and of themselves reasonably indicate that petitioner would *currently* pose a threat to public safety. (*Lawrence, supra,* 44 Cal.4th at p. 1212.) With respect to petitioner's prison behavior, far from demonstrating unsuitability, the fact that petitioner has not received any serious discipline since 1992 shows that petitioner "has coped with the many stresses of prison life in a nondestructive manner." (*In re Roderick* (2007) 154 Cal.App.4th 242, 274.)

We then turn to the Governor's determination that petitioner may not accept responsibility for the commitment offense.[6] As support for this finding, the Governor relied on petitioner's various descriptions of the crime, as well as a 1981 polygraph examination of David Burns which purportedly undercuts petitioner's claims that Burns injured the victim or had possession of the victim's wallet. Putting aside the inherent difficulties attendant to reliance on polygraph results (see generally *United States v. Scheffer* (1998) 523 U.S. 303, 309 ["there is simply no consensus that polygraph evidence is reliable"]), we have observed that "a prisoner's refusal to admit participation in the crime on matters of conflicting evidence does not necessarily constitute unsuitability for parole . . . ." (*In re Caswell* (2001) 92 Cal.App.4th 1017, 1033 (*Caswell*).) The Governor's decision violates this principle.

We further explained in *Caswell* that "[s]ection 2236 of title 15 of the California Code of Regulations reads: 'The facts of the crime shall be discussed with the prisoner to assist in determining the extent of personal culpability. *The board shall not require an admission of guilt* to any crime for which the prisoner was committed . . . . Nor does appellant provide any legal authority for the proposition that a prisoner's 'minimization' of his involvement in the crimes is sufficient to warrant rescission where, as here, the

[6] Respondent's return suggests that the Governor found that petitioner has given "inconsistent statements" about the events leading up to the crime. The Governor's decision, fairly read, does not reach such a conclusion, and respondent does not explain in any detail how petitioner's statements are inconsistent.

prisoner has acknowledged responsibility and demonstrated remorse." (*Caswell, supra,* 92 Cal.App.4th at p. 1033.)

In his decision, the Governor relied on a 1991 Category X evaluation of petitioner, which concluded that petitioner minimizes his motives and actions and lacks an understanding of the underlying dynamics of the offense even while accepting culpability for the offense. However, as in *Caswell,* the record before us contains ample, and repeated, expressions from petitioner acknowledging his responsibility for, and deep remorse about, the crime. Thus, this case is unlike *Shaputis, supra,* 44 Cal.4th at page 1260, where the record demonstrated that the inmate lacked insight about his conduct and his commission of the commitment offense.

The Governor's reliance on the 1991 Category X evaluation is problematic for another reason. In *Lawrence,* the court rejected the Governor's reliance on dated psychological reports, where "the positive psychological assessments of petitioner in every evaluation conducted during the last 15 years have undermined the evidentiary value of these dated reports setting forth stale psychological assessments." (*Lawrence, supra,* 44 Cal.4th at pp. 1223-1224.) The same observation is applicable to the record before us. Just one year after the 1991 Category X evaluation, a psychiatric evaluation reported that petitioner had "gained some insight into his own tendencies for violent behavior[.]" A psychological evaluation from 1996 states that petitioner "impresses as a man who has made significant progress in developing an[] inner life," and "[h]e is now able to view his offense and his actions as that of an irrational person. Although he had previously claimed he was unduly influenced by the goading of his crime partner, he recognizes that he was not really thinking at the time but just mad." The most current psychological report considered by the Board states that petitioner "acknowledged culpability and responsibility for his commitment offense and, in the opinion of this examiner, he expressed genuine regret, remorse, and compassion for the victim and his family."

The Governor criticized the Board's reliance on the fact that the crime was committed as a result of significant stress in petitioner's life (alcohol abuse and loss of

employment), and concluded that this "does not sufficiently mitigate the nature and circumstances of the murder he committed." However, the regulations indicate that a crime committed as a result of significant stress is to be viewed as a factor in *favor* of parole suitability. (§ 2402, subd. (d)(4) ["The prisoner committed his crime as the result of significant stress in his life, especially if the stress has built over a long period of time."].)

Respondent appears to contend that the Governor properly relied upon the district attorney's opposition to the granting of parole. While we agree that the Governor is required to consider this evidence (Pen. Code, §§ 3042, subd. (a), 3046, subd. (c)), arguments of counsel are not evidence. (*People v. Richardson* (2008) 43 Cal.4th 959, 1004 ["[i]t is axiomatic that statements by counsel are not evidence]".) Additionally, while the Governor's decision states that the district attorney opposed petitioner's release "based, in part, on the gravity of the offense," the record belies this claim. In any event, even if the district attorney had expressed this view, we note that while "[t]he district attorney's argument . . . undoubtedly influence[s] the Board with respect to the weight it gives to evidence of unsuitability . . . the opposition cannot add weight where there is no evidence of unsuitability to place in the balance." (*In re Weider* (2006) 145 Cal.App.4th 570, 590.)

In sum, we find the Governor's decision is not supported by some evidence of petitioner's current dangerousness, and must be set aside. (*Lawrence, supra,* 44 Cal.4th at p. 1227.)

4. *The Appropriate Remedy is Reinstatement of the Board's Decision*

Respondent asserts that in the event we find the Governor's decision wanting under the some evidence standard, we should vacate the Governor's decision and remand the matter either to the Board or the Governor.

Respondent suggests that we remand the matter to the Board *without* any limiting instructions (such as an instruction ordering the Board to find petitioner suitable for parole unless evidence of petitioner's conduct subsequent to his 2006 parole hearing shows he poses a current risk of danger). Respondent reasons that the Board should be

permitted to evaluate petitioner's post-2006 prison conduct alongside evidence pertinent to all of the regulatory factors, regardless of whether that evidence existed at the time of the 2006 parole decision, since *Lawrence* emphasized that "[i]t is not the existence or nonexistence of suitability or unsuitability factors that forms the crux of the parole decision; the significant circumstance is how those factors *interrelate* to support a conclusion of current dangerousness to the public." (*Lawrence, supra,* 44 Cal.4th at p. 1212, italics added.)

A remand to the Board with or without limiting instructions appears senseless—given that the Board found petitioner *suitable* for release—and unnecessary—since nothing would appear to prohibit the Board from initiating parole rescission proceedings should circumstances warrant such action.[7] In *Rosenkrantz, supra,* 29 Cal.4th at page 656, the Supreme Court recognized that "[a]fter the Board has set a parole date for a prisoner, the Board is authorized to rescind that date for cause. [Citation.] Cause for rescission of parole may be established by circumstances such as disciplinary misconduct, a deterioration in the mental state of the inmate, or an inability to meet a special condition of parole. [Citation.] . . . 'A parole date, like a good time credit, is a prospective benefit that is conditioned on the inmate's continued good performance and subject to review and withdrawal for cause by the [Board]." (See also § 2450 et seq.)

Alternatively, respondent urges us to remand this case to the Governor for further consideration in light of *Lawrence* and *Shaputis,* which were issued after the Governor's decision in this case. However, respondent's request does not follow from *Lawrence* itself. As our colleagues in the Second District aptly observed, "[i]n *Lawrence*, the Governor reversed the Board's decision to grant the inmate parole. [Citation.] The Court of Appeal then granted the inmate's petition for a writ of habeas corpus and reinstated the Board's decision. [Citation.] The Supreme Court affirmed the Court of Appeal's judgment. [Citation.] The disposition of *Lawrence* thus was *not* to remand the case to the Governor for reconsideration . . . it was to reinstate the Board's decision." (*In re*

[7] At oral argument, the parties agreed that rescission proceedings are available to the Board.

Masoner (2009) 179 Cal.App.4th 1531, 1537, original italics.) Additionally, it bears noting that while *Lawrence* clarified the standard of review to be applied by the *courts* in reviewing parole suitability decisions, it did not in any way alter the legal framework under which the suitability decision itself is rendered by the Board or the Governor. Respondent's return acknowledges that "[t]he California Supreme Court's clarification of the standard of judicial review [in *Lawrence* and *Shaputis*] did not impose a new requirement on the executive branch . . . ."

In any event, since the record before us does not contain some evidence supporting the Governor's decision, it would be pointless to remand the matter to the Governor for further consideration. Accordingly, we agree with those courts which have found that the appropriate remedy in these circumstances is to vacate the Governor's decision and to reinstate the Board's decision. (See, e.g., *In re Smith* (2003) 109 Cal.App.4th 489, 507; *In re Aguilar* (2008) 168 Cal.App.4th 1479, 1491-1492; *In re Burdan, supra,* 169 Cal.App.4th at p. 39; *In re Vasquez* (2009) 170 Cal.App.4th 370, 386; *In re Dannenberg* (2009) 173 Cal.App.4th 237, 256-257.)

III. DISPOSITION

The order to show cause is discharged. The petition for writ of habeas corpus is granted. The Governor's decision is vacated, and the Board's decision is reinstated. In

the interests of justice, this decision shall be final in this court ten (10) days from the date of filing. (Cal. Rules of Court, rule 8.490(b)(3).)

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.